IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION IN LIMINE TO PRECLUDE ARGUMENT, QUESTIONING OR EVIDENCE THAT ALLEGED AGENCY INACTION WOULD PRECLUDE ISSUANCE OF THE REQUESTED PERMANENT INJUNCTIVE RELIEF

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), and respectfully requests that this Court issue an order precluding argument, questioning or evidence that alleged agency inaction would preclude issuance of the permanent injunctive relief requested by the State. In support of its Motion, the State states;

1. This is an action seeking, *inter alia*, permanent injunctive relief to stop Defendants' improper disposal of waste generated by their birds because that improper waste disposal causes environmental harm and human health dangers. The State has brought injunctive claims under RCRA, the federal common law of nuisance, state nuisance and trespass theories, as well as under certain Oklahoma statutes. The State has alleged, and Defendants have not disputed, that land application of wastes generated by Defendants' birds continues to the present time, and Defendants make no sign of ceasing the challenged waste disposal practices. Consequently, the environmental harm and health risks are present, immediate, and, unless enjoined by the Court, will continue.

2. Defendants may suggest or imply that because various agencies have allegedly not taken action with respect to the environmental harm or human health dangers posed by Defendants' poultry waste disposal practices, issuance of the requested permanent injunction would somehow be precluded. The present motion demonstrates that no legal or equitable basis exists for such argument or evidence at trial.

3. Putting aside the fact that it is factually incorrect, the argument is flawed on at least two legal grounds. First, it ignores the fact that the Oklahoma Attorney General exercises concurrent authority with Oklahoma agencies to enforce the environmental laws. *See, e.g.*, "State of Oklahoma's Memorandum in Opposition to 'Cobb Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action.'" [DKT # 133]. The Court denied the Cobb Vantress motion by order DKT # 1206.

4. Second, it ignores the fact that estoppel is not a defense against the State. *See, e.g., State ex rel. King v. Friar,* 25 P.2d 620, 623 (Okla. 1933)(laches and estoppel do not operate against the state, and no procrastination of public officials prejudices the state, and their tardiness neither bars nor defeats the state from vindicating its sovereign rights, except where positive statutes so provide); *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900, 911 (Okla. 1980) ("it is fundamental that a state and its subdivision cannot be estopped from protecting public rights when public officials have acted erroneously or failed to act"); *Burdick v. Independent School Dist. No. 52 of Oklahoma County*, 702 P.2d 48, 53 (Okla. 1985) ("Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state, the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a governmental shield from estoppel is to enable the state

to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties"); *see also Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 & 63 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. . . . [T]he general rule [is] that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law"); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest").

5. The party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse." *See Heckler*, 467 U.S. at 59. Heretofore, Defendants cannot claim that they relied on any representation by the State and changed their position for the worse. Moreover, no policy or statutory enactment exists that overrides the usual rule that laches and estoppel do not apply to the State, especially when enforcing sovereign rights of public protection. Quite the contrary, Oklahoma law consistently seeks to protect from pollution the environment in general, and the State's waters in particular. For example, provisions of (1) the Agriculture Code, *see, e.g.*, 2 Okla. Stat. § 10-9.7(C)(6)(c), declaring discharge or runoff of waste from the application site is prohibited, (2) the Environmental Code, *see, e.g.*, 82 Okla. Stat. § 1084.1, declaring water pollution constitutes a menace to public health and welfare and creates public nuisances, and (3) the law regarding public nuisance, *see, e.g.*, 50 Okla. Stat. § 7, providing no lapse of time can legalize a public nuisance amounting to an

obstruction of public right, consistently prohibit pollution, and in no way lull polluters into improper practices to their detriment. Consequently, no laches or estoppel can operate to bar the State's action for injunctive relief.

6. Therefore, it is clear that argument and evidence on this issue would be irrelevant and an improper distraction. *See* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible"). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan,* 485 F.3d 1214, 1218 (10th Cir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)." *United States v. Oldbear,* 568 F.3d 814, 820 (10th Cir. 2009).

7. Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Relevant evidence may be excluded if it fails the Rule 403 analysis." *Wolfgang v. Mid-America Motorsports, Inc.,* 111 F.3d 1515, 1527 (10th Cir. 1997) (citation omitted).

8. Because evidence of alleged delay or agency inaction on the part of State agencies would not tend to make any matter of consequence in this case more or less probable in light of the inapplicability of the doctrines of laches or estoppel to the State, such evidence is legally irrelevant. In sum, any alleged delay in action by a State agency is not a consequential fact in

this case. Even if it were somehow minimally relevant, its tendency to confuse issues, mislead the jury, or cause undue delay or waste of time makes it inadmissible.

WHEREFORE, in light of the foregoing, Defendants should be precluded from making argument, doing questioning or proffering evidence going to the proposition that alleged agency inaction would preclude issuance of the permanent injunctive relief.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/Robert A. Nance
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com

Sharon K. Weaver sweaver@riggsabney.com
Robert A. Nance rnance@riggsabney.com
D. Sharon Gentry sgentry@riggsabney.com
David P. Page dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis Werner Bullock lbullock@bullock-blakemore.com
Robert M. Blakemore bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE

Frederick C. Baker fbaker@motleyrice.com
Lee M. Heath lheath@motleyrice.com
Elizabeth C. Ward lward@motleyrice.com
Elizabeth Claire Xidis cxidis@motleyrice.com
William H. Narwold bnarwold@motleyrice.com
Ingrid L. Moll imoll@motleyrice.com
Jonathan D. Orent jorent@motleyrice.com
Michael G. Rousseau mrousseau@motleyrice.com
Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

David C. Senger david@cgmlawok.com

Robert E Sanders rsanders@youngwilliams.com
Edwin Stephen Williams steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com

Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Melissa C. Collins mcollins@faegre.com
Colin C. Deihl cdeihl@faegre.com
Randall E. Kahnke rkahnke@faegre.com
FAEGRE & BENSON, LLP

Dara D. Mann dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick bchadick@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.
Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

John Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

Stephen L. Jantzen sjantzen@ryanwhaley.com
Paula M. Buchwald pbuchwald@ryanwhaley.com
Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

Mark D. Hopson mhopson@sidley.com
Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Thomas C. Green tcgreen@sidley.com
Gordon D. Todd gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
TYSON FOODS, INC

Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
Dustin R. Darst dustin.darst@kutakrock.com
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Frank M. Evans, III fevans@lathropgage.com
Jennifer Stockton Griffin jgriffin@lathropgage.com
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

Robin S Conrad rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov
Counsel for State of Arkansas and Arkansas National Resources Commission

Mark Richard Mullins richard.mullins@mcafeetaft.com
MCAFEE & TAFT
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen

Mia Vahlberg mvahlberg@gablelaw.com
GABLE GOTWALS

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP
Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation

John D. Russell jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP
Counsel for Arkansas Farm Bureau Federation

Barry Greg Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON

Nikaa Baugh Jordan njordan@lightfootlaw.com
William S. Cox, III wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC

Counsel for American Farm Bureau and National Cattlemen's Beef Association

Duane L. Berlin dberlin@levberlin.com
LEV & BERLIN PC
Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research

Also on this 5th day of August, 2009 I mailed a copy of the above and foregoing pleading to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Rd 658
Kansas, Ok 74347

/s/Robert A. Nance